

[Federal Register: February 17, 2009 (Volume 74, Number 30)]
[Notices]
[Page 7536-7541]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr17fe09-182]

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2008-0053]

Surface Transportation Project Delivery Pilot Program; Caltrans
Audit Report

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final report.

SUMMARY: Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) established the Surface Transportation Project Delivery Pilot Program, codified at 23 U.S.C. 327. To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates semiannual audits during each of the first 2 years of State participation. This final report presents the findings from the second FHWA audit of the California Department of Transportation (Caltrans) under the pilot program.

FOR FURTHER INFORMATION CONTACT: Ms. Ruth Rentch, Office of Project Development and Environmental Review, (202)-366-2034, Ruth.Rentch@dot.gov, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366-4928, Michael.Harkins@dot.gov, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at <http://www.archives.gov> and the Government Printing Office's Web site at <http://www.access.gpo.gov>.

Background

Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (codified at 23 U.S.C. 327) established a pilot program to allow up to five States to assume the Secretary of Transportation's responsibilities for environmental review, consultation, or other actions under any Federal environmental law pertaining to the review or approval of highway projects. In order to be selected for the pilot program, a State must submit an application to the Secretary.

On June 29, 2007, Caltrans and FHWA entered into a Memorandum of Understanding (MOU) that established the assignments to and assumptions of responsibility to Caltrans. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under the National Environmental Policy Act, as well as the FHWA's responsibilities under other Federal environmental laws for most highway projects in California.

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) requires the Secretary to conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The results of each audit must be presented in the form of an audit report and be made available for public comment. The FHWA solicited comments on the second audit report in a Federal Register Notice published on December 8, 2008, at 73 FR 74560. The FHWA received one anonymous comment questioning any time or money saved from participation in the pilot program. This notice provides the final draft of the second FHWA audit report for Caltrans under the pilot program.

Authority: Section 6005 of Public Law 109-59; 23 U.S.C. 315 and 327.

Issued on: February 10, 2009.

Jeffrey F. Paniati,
Acting Deputy Federal Highway Administrator.

Surface Transportation Project Delivery Pilot Program Federal Highway
Administration Audit of California Department of Transportation July
28-August 1, 2008

Background

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU, Pub. L.109-59) section 6005(a) established the Surface Transportation Project Delivery Pilot Program (Pilot Program), codified at title 23, United States Code (U.S.C.), section 327. The Pilot Program allows the Secretary to assign, and the State to assume, the Secretary of Transportation's (Secretary) responsibilities under the National Environmental Policy Act (NEPA) for one or more highway projects. Upon assigning NEPA responsibilities, the Secretary may further assign to the State all or part of the Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review of a specific highway project. When a State assumes the Secretary's responsibilities under this program, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of the Federal Highway Administration (FHWA).

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates that FHWA, on behalf of the Secretary, conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The focus of the FHWA audits is to assess a pilot State's compliance with the required Memorandum of Understanding (MOU) \1\ and applicable Federal laws and policies, to collect information needed to evaluate the success of the Pilot Program, to evaluate pilot State progress toward achieving its performance measures, and to collect information needed for the Secretary's annual report to Congress on the administration of the Pilot Program. Additionally, 23 U.S.C. 327(g) requires FHWA to present the results of each audit in the form of an audit report. This audit report must be made available for public comment, and FHWA must

[[Page 7537]]

respond to public comments received no later than 60 days after the date on which the period for public comment closes.

\1\ Caltrans MOU between FHWA and Caltrans available at: http://environment.fhwa.dot.gov/strmlng/safe_cdot_pilot.asp.

The California Department of Transportation (Caltrans) published its Application for Assumption (Application) under the Pilot Program on March 14, 2007, and made it available for public comment for 30 days. After considering public comments, Caltrans submitted its application to FHWA on May 21, 2007, and FHWA, after soliciting the views of other Federal agencies, reviewed and approved the application. Then on June 29, 2007, Caltrans and FHWA entered into an MOU that established the assignments to and assumptions of responsibility to Caltrans, which became effective July 1, 2007. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under NEPA, as well as FHWA's responsibilities under other Federal environmental laws for most highway projects in California. Caltrans' participation in the Pilot Program will be effective through August 2011 (23 U.S.C 327(i)(1)).

Scope of the Audit

This is the second FHWA audit of Caltrans' participation in the Pilot Program. The onsite portion of this audit was conducted by the FHWA audit team in California from July 28 through August 1, 2008. As required in SAFETEA-LU, the second audit assessed Caltrans' compliance with the roles and responsibilities it assumed in the MOU and also provided recommendations to assist Caltrans in conducting a successful Pilot Program.

The audit reviewed the following core areas: (1) Program management; (2) legal sufficiency; (3) performance measures; (4) documentation and file management; (5) training; and (6) quality assurance and quality control measurement. Prior to the onsite visits, FHWA conducted telephone interviews with staff in the Caltrans Headquarters (HQ) office and with staff in Federal resource agency regional offices (Environmental Protection Agency, U.S. Corps of Engineers, U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration and U.S.D.A. Forest Service) and the California State Historic Preservation Office. The audit included onsite visits to three Caltrans District Offices: District 7 (Los Angeles), District 8 (San Bernardino), and District 11 (San Diego).

Audit Process and Implementation

Each FHWA audit conducted under the Pilot Program is planned to ensure a pilot State's compliance with the commitments in its MOU with FHWA. FHWA does not evaluate specific project-related decisions made by the State because these decisions are the sole responsibility of the pilot State. However, the scope of the FHWA audits does include the review of the processes and procedures used by the pilot State to reach project decisions in compliance with MOU section 3.2.

Also, Caltrans committed in its Application (incorporated by reference in MOU section 1.1.2) to implement specific processes to strengthen its environmental procedures in order to assume the responsibilities assigned by FHWA under the Pilot Program. The FHWA

audits review how Caltrans is meeting each commitment and assesses Pilot Program performance in the core areas specified in the Scope of the Audit section of this report.

The Caltrans' Pilot Program commitments address:

- Organization and Procedures under the Pilot Program;
- Expanded Quality Control Procedures;
- Independent Environmental Decisionmaking;
- Determining the NEPA Class of Action;
- Consultation and Coordination with Resource Agencies;
- Issue Identification and Conflict Resolution Procedures;
- Record Keeping and Retention;
- Expanded Internal Monitoring and Process Reviews;
- Performance Measures to Assess the Pilot Program;
- Training to Implement the Pilot Program;
- Legal Sufficiency Review.

The FHWA audit team included representatives from the following offices or agencies:

FHWA Office of Project Development and Environmental Review;

- FHWA Office of Chief Counsel;
- FHWA Alaska Division Office;
- FHWA Resource Center Environmental Team;
- Volpe National Transportation Systems Center;
- Advisory Council on Historic Preservation;
- U.S.D.A. Forest Service.

During the onsite audit, FHWA interviewed more than 75 Caltrans staff (from both the Capital and Local Assistance programs) in the 3 District offices and Caltrans' Legal Division staff in each of its 4 offices. The audit team interviewed a cross-section of staff including top senior managers, senior environmental planners, generalists, associate planners, and technical experts. The audit also included a review of the project files and records for over 30 projects managed under the Pilot Program.

FHWA acknowledges that Caltrans identified specific issues during its second self-assessment performed under the Pilot Program (required by MOU section 8.2.6), and has processes in place to work toward resolving each issue. Some issues described in the Caltrans self-assessment may overlap with FHWA findings in this audit report. This audit report documents findings within the scope of the audit and as of the dates of the onsite portion of the audit.

In accordance with MOU section 11.4.1, FHWA provided Caltrans with a 30-day comment period to review the draft audit report. FHWA reviewed the comments received from Caltrans and revised sections of the draft report, where appropriate, prior to publishing it in the Federal Register for public comment.

Progress Since the Last Audit

As part of the second FHWA audit of the Caltrans' Pilot Program, FHWA verified that Caltrans demonstrated continued compliance in the ``Compliant'' findings areas identified in the first audit in January 2008. These compliant findings were:

1. Legal Sufficiency--Caltrans' Legal Division has developed a consistent process to conduct formal legal sufficiency reviews by attorneys (and has provided basic legal sufficiency training to each reviewing attorney).
2. Establish Pilot Program Policies and Procedures--Caltrans currently, in general, complies with MOU section 1.1.2 commitments to establish Pilot Program policy and procedural documentation (as detailed in Caltrans' Application).

3. Background NEPA Training--Caltrans' existing Environmental Staff Development Program, outlined in the Application, has processes in place to ensure that Environmental Staff involved in NEPA documentation have the underlying foundational skill sets required in addition to the added skills required to address responsibilities under the Pilot Program.

4. Training Plan--Caltrans conducted a training needs assessment specific to the Pilot Program and developed a training plan titled ``Caltrans Surface Transportation Project Delivery Pilot Program Training Plan (Oct. 1, 2007).''

5. Interagency Agreements that Involve Other Agencies as Signatories--Caltrans complied with MOU section 5.1.5 as it pertains to the National Historic Preservation Act, Section 106

[[Page 7538]]

Programmatic Agreement (PA) by completing an addenda to the PA within 6 months after the effective date of the MOU to reflect Caltrans' assignment of authority under the Pilot Program.

6. State Commitment of Resources--The initial evaluation of resources to implement the Pilot Program and the assignment of resources, as of the date of the first audit, is compliant with MOU section 4.2.

FHWA also evaluated progress in resolving ``Deficient'' and ``Needs Improvement'' audit findings from the first FHWA audit.

Caltrans addressed ``Deficient'' audit findings from the January 2008 audit as follows:

(1) Statement Regarding Assumption of Responsibility--The required statement regarding assumption of responsibility required by MOU section 3.2.5 appeared on the cover page of each environmental document reviewed in the second audit.

(2) Records Management--Caltrans demonstrated progress in the area of records management. The audit team confirmed that project files were present in Districts 7, 8, and 11 as required under the Caltrans Uniform Filing System (UFS). Caltrans is working toward full compliance of the implementation of MOU section 8.3, the Caltrans Application (Section 773.106(b)(3)(i) and (ii)), and the Caltrans Standard Environmental Reference (SER) Chapter 38.

(3) QA/QC Process--The audit team observed progress in implementing the Quality Assurance/Quality Control (QA/QC) process for environmental documents developed under the Pilot Program in the following areas:

a. Completion of the Quality Control Certification forms--The completion of the Internal and External Quality Control Reviews Certification forms improved based on FHWA audit team project file reviews completed in Districts 7, 8, and 11 during the second audit.

b. Peer Reviewer--In April 2008, Caltrans revised Chapter 38 of the SER to clarify the description of the peer reviewer function for the QA/QC process for environmental documents produced under the Pilot Program. All of the QC forms reviewed by FHWA in Districts 7, 8, and 11 that were prepared after the change to the SER complied with this requirement.

c. Internal and External Quality Control Reviews--Caltrans revised the Internal and External QC certification forms and the Environmental Document Preparation and Review Tool (Environmental Document Checklist) to address feedback from Caltrans staff, the initial Caltrans self-assessment, and the January 2008 FHWA audit.

Caltrans addressed ``Needs Improvement'' audit findings from the January 2008 audit as follows:

(1) QA/QC Process Related to SER Chapter 38 Procedural and Policy Changes--Caltrans has created a new section in the SER, titled ``SER

Posting History,' which presents a chronology of changes made in the SER (i.e., SER chapter changed, date of change, summary of change).

(2) Self-assessment issues and corrective actions--The second self-assessment completed by Caltrans correlated each identified issue needing improvement to the corrective action(s) being taken to address each issue.

(3) QA/QC process implementation and documentation--Caltrans revised SER Chapter 38 in April 2008 to clarify the QA/QC process requirements, the technical specialist review, the internal peer review, the class of action determination, signature authorities, and the options each District may use to communicate that an environmental document is ready for signature. Through interviews with staff in the four Caltrans Districts (Districts 4, 7, 8, and 11) visited, the audit team determined that the Districts are using some format of a ``Ready for Signature'' QC form to transmit to the District Deputy Director that the environmental document is ready for signature.

Key Elements of Implementation

One of the purposes of each FHWA audit of a State Pilot Program is to identify and collect information for consideration by potential future Pilot Program participants. Key elements that are being used by Caltrans in the implementation of the Pilot Program include their SER, particularly Chapter 38-NEPA Delegation, Caltrans annotated outlines for environmental documents, quality control certification forms, environmental document review checklists, and monthly NEPA delegation statewide teleconferences.

During the interviews and project files reviews completed in Districts 7, 8, and 11, the audit team observed the following effective practices:

(1) Use of standard ``spreadsheet'' template to convey the comments of HQ NEPA coordinators on environmental documents to District staff--Through interviews with HQ NEPA coordinators and review of project files, the audit team observed a systematic mechanism used to communicate comments on environmental documents. The HQ NEPA coordinator consolidates the comments on each environmental document reviewed and provides the comments to the District point of contact via a standard ``spreadsheet'' template. The template file includes information on each document section, the comment and action needed, and identifies the commenter. The audit team identified records of these communications in project files. This approach provides a systematic and transparent mechanism to transfer and document communications between HQ and District staff on environmental documents.

(2) Use of intranet sites at Districts to access Pilot Program materials and documents--The audit team determined through interviews with staff at Districts 7, 8, and 11 that each of these Districts use an intranet site (not accessible to the public) to post District specific documents related to the Pilot Program. Maintaining an internal system for all users at the District to access the latest District specific Pilot Program documents provides for improved consistency in implementing the Pilot Program.

(3) File transfer as standard operating procedure when transferring projects between staff--The audit team determined through interviews with Caltrans staff that file transfer procedures were in selective use at some Districts visited during the audit, to address employee turnover or the transitioning of projects between staff. File transfer practices include a file transfer meeting where the generalist hands off all documents to the Senior Planner overseeing the individual's work.

Overall Audit Opinion

Based on the information reviewed, it is the FHWA audit team's opinion that to date, Caltrans has been carrying out the responsibilities it has assumed in keeping with the intent of the MOU and the Application. During the onsite audit, Caltrans staff and management continued to indicate ongoing interest in obtaining constructive feedback on successes and areas for improvement. By addressing the findings in this report, Caltrans will continue to move the program toward success.

Findings Definitions

The FHWA audit team carefully examined Pilot Program areas to assess compliance in accordance with established criteria (i.e., MOU, Application). The time period covered by this second audit report is from the start of the Caltrans Pilot Program (July 1, 2007) through completion of the second onsite audit (August 1, 2008). This report presents audit findings in three areas:

[[Page 7539]]

Compliant--Audit verified that a process, procedure or other component of the Pilot Program meets a stated commitment in the Application for Assumption and/or MOU.

Needs Improvement--Audit determined that a process, procedure or other component of the Pilot Program as specified in the Application for Assumption and/or MOU is not fully implemented to achieve the stated commitment or the process or procedure implemented is not functioning at a level necessary to ensure the stated commitment is satisfied. Action is recommended to ensure success.

Deficient--Audit was unable to verify if a process, procedure or other component of the Pilot Program met the stated commitment in the Application for Assumption and/or MOU. Action is required to improve the process, procedure or other component prior to the next audit; or

Audit determined that a process, procedure or other component of the Pilot Program did not meet the stated commitment in the Application for Assumption and/or MOU. Corrective action is required prior to the next audit.

Summary of Findings--July 2008

Findings--Compliant

(C1) Training of Legal Division Staff--In compliance with MOU section 12.1.1 and section 773.106(b) (3) (iii) of Caltrans' Application, Caltrans' Legal Division maintains a staff of qualified attorneys supporting the Pilot Program and tracks the trainings attended by each attorney. Attorney training is organized into five core areas (Legal Sufficiency, Section 4(f), Section 7 of the Endangered Species Act, Environmental Tools (internal to Caltrans), and Audit). Additionally, the four Assistant Chief Counsels (ACC) with environmental law responsibilities work together to identify additional training opportunities available statewide. Each ACC has approval authority to fund additional training opportunities for attorneys on their team.

(C2) Conformity Determinations--Section 8.5 of the MOU requires that FHWA's California Division Office document the project level conformity determination by transmitting a letter to Caltrans to be included in the Final Environmental Impact Statement (EIS) or

Environmental Assessment (EA). Based on interviews with Caltrans staff and review of 15 project files, conformity decisions were completed in accordance with MOU section 8.5.

Findings--Needs Improvement

(N1) Commitment of Resources--Section 4.2.2 of the MOU requires Caltrans to maintain adequate organizational and staff capability to effectively carry out the responsibilities it has assumed. Interviews with Caltrans District staff working on Capitol Projects revealed that the Work Breakdown Structure (WBS) code established to track actual time spent on Pilot Program activities is not used in a consistent manner. Inconsistent use and understanding of the WBS code to track labor expenditures under the Pilot Program provides inaccurate information on the resources used to support the Pilot Program. Caltrans should continue to clearly define, communicate and emphasize consistent use of the WBS to staff supporting the Capital Projects component of the Pilot Program, which activities to track using the designated WBS code for the Pilot Program.

Interviews with Caltrans District staff working on Local Assistance Projects revealed an inability to track actual time spent on Pilot Program activities through the use of the Expenditure Authorization system.

Given this two part finding, it is unclear whether Caltrans is able to accurately and fully assess the current and future resource needs for implementation of the Pilot Program.

(N2) District Training Approaches and Implementation--MOU section 4.2.2 requires Caltrans to maintain adequate organizational and staff capability to effectively carry out the responsibilities it has assumed under the Pilot Program. A fundamental component of staff capability is maintaining a training program that ensures staff competency to meet Pilot Program responsibilities. The responsibility of identifying individual staff training needs largely falls to managers at the District level. Audit observations in the three Districts visited (Districts 7, 8, and 11) during this audit, along with the one District visited (District 4) during the previous audit, confirmed that considerable variation in training approaches exist between District managers, which can result in potentially widely varying levels of competency among staff. This variation in staff training levels could affect staff competency levels and compliance with commitments under the Pilot Program. As Caltrans HQ and Districts continue to assess and address staff training needs, Caltrans needs to actively monitor how District staff training needs are assessed and demonstrate consistency among and within Districts in the delivery of training in order to achieve a sufficient level of competency among all associated staff. Inconsistencies identified through Caltrans self-assessments and audit findings also serve as a source to identify training needs, including:

(a) Project Files--When to initiate a project file and what information it should contain;

(b) Internal QA/QC Certification Form--Who the reviewers should be and when they should sign the form;

(c) Class of action determinations--What documentation is used, when a determination is required, and who must be involved;

(d) Differentiating between Categorical Exclusions (CE) that fall under section 6004 and section 6005 MOUs between Caltrans and FHWA; and

(e) What approvals and decisions are to be included in quarterly reports on the Pilot Program and at what project stage they are to be reported;

(f) Environmental document transmittals for the legal sufficiency process; and

(g) Environmental document and project file transmittals to transfer projects between staff.

(N3) Performance Measure Evaluation--MOU section 10.1.1 requires Caltrans to develop performance measures for the Pilot Program. MOU section 10.1.2 requires FHWA to evaluate these performance measures during the audits and include the evaluation in the audit reports.

FHWA noted the following areas in need of improvement with respect to two Pilot Program performance measures--``Timely Completion of NEPA Process'' and ``Compliance with NEPA and other Federal laws and regulations.''

(a) Performance Measure: Timely Completion of NEPA Process.

(i) Caltrans measures the time to complete the environmental document review and approval process for draft and final documents. While the document review component is one element that Caltrans may use to evaluate performance under the Pilot Program, this performance measure evaluates a relatively minor part of the overall project timeline. In all cases where this current measure is reported, Caltrans needs to provide full disclosure of the limitations of the measure, preferably noting that the time period covered is only a small part of the overall NEPA process. Caltrans should consider expanding this measure to include other elements assumed under the Pilot Program to more robustly

[[Page 7540]]

evaluate the timely completion of the NEPA process.

(ii) Caltrans uses baseline data to evaluate progress since assuming Pilot Program responsibilities. Thirty-five environmental documents reviewed and approved prior to the effective date of the MOU (34 EAs and 1 EIS) are used to draw from for performance measure purposes. Variables such as project size, scope, and complexity, as well as any required scheduling coordination with resource agencies, could affect the start time of document reviews and as such any comparisons with Pilot Program projects need to consider these factors. The current approach of using the median time from the beginning of the administrative review process for a document to the document approval date, prior to and during the Pilot Program does not provide a realistic or reliable basis of comparison. At a minimum, the metric does not account for the type of document being reviewed or any of the other variables involved in the projects. A more effective representation of project timing would be to compare the timing of projects prior to and during the Pilot Program by document type (i.e., compare EIS projects to EIS projects) and other relevant variables, such as project size, scope and complexity.

(b) Performance Measure: Compliance with NEPA and other Federal laws and regulations (Maintain documented compliance with requirements of all Federal laws and regulations being assumed). Caltrans measures performance by evaluating the percentage of environmental documents (draft and final) with a completed Environmental Document Preparation and Review Tool and Internal Certification Environmental Document Quality Control Reviews form. Caltrans set at the start of the Pilot Program a desired outcome of this performance measure of a 100 percent completion rate. Based on the results of the first two Caltrans self-assessments, the acceptable completion rate was modified to a phased-in approach over a 2-year period of time (increasing from 75 percent to 95 percent).

The audit team was unable to identify the basis Caltrans used to modify the acceptable completion rate for this performance measure. As Caltrans is using the completion of the Environmental Document Preparation and Review Tool and Internal Certification Environmental Document Quality Control Reviews form as a method of demonstrating compliance with NEPA and other Federal laws and regulations, a

completion rate of less than 100 percent would not correlate with the demonstration of compliance with assumed responsibilities under the Pilot Program.

For every compliance related performance measure that is not at 100 percent, Caltrans needs to document each item of noncompliance in the project file and correct each deficiency identified.

Caltrans (with FHWA involvement under MOU section 10.1.1) needs to develop an approach to evaluate the effectiveness of each performance measure and to establish a process to communicate changes implemented for each performance measure.

(N4) Quarterly Reports--The quarterly reports Caltrans provides to FHWA under section 8.2.7 of the MOU have not consistently included an accurate listing of all approvals and decisions under the Pilot Program. Quarterly reports received by FHWA have been revised and resubmitted by Caltrans to address reporting data gaps. Audit team review of the content of the quarterly reports and discussions with Caltrans staff who develop input for the quarterly reports suggested that the processes leading to report production is inconsistent in approach to what approvals and decisions are to be reported to Caltrans HQ by the District offices. Clear guidance to the Districts is needed on what approvals and decisions are to be reported and at what stage they are to be reported.

(N5) Varying Understanding of Section 6004/Section 6005 CEs--Sections 3.1.1 and 3.1.2 of the MOU define the scope of assignment in terms of the Section 6004 MOU (State Assumption of Responsibility for the Categorical Exclusion program, 23 U.S.C. 326). An inconsistent understanding of determinations of Section 6005 versus Section 6004 project applicability was identified from interviews and review of project files during the audit. For each CE, District staff need to understand the purpose, use of Caltrans procedures associated with CEs and consistently complete and maintain in the project file the Categorical Exemption/Categorical Exclusion Determination form and the Categorical Exclusion Checklist.

(N6) Creating and Maintaining Project File Protocols--Section 8.2.4 of the MOU requires that Caltrans maintain project files that include all letters and comments received from governmental agencies, the public, and others relating to the Pilot Program responsibilities. In addition, section 8.2.5 of the MOU requires Caltrans to review and monitor project file documentation through its QA/QC process. In District 7, 8, and 11, the audit team identified a lack of consistent filing and record keeping procedures related to the storage of electronic communications. Caltrans does not maintain a systematic process and has not established formal directives regarding electronic correspondence and/or documents, a lack which could result in the loss of electronic data.

(N7) Maintenance of Project and General Administrative Files--Section 8.2.4 of the MOU requires Caltrans to maintain project and general administrative files pertaining to its discharge of the responsibilities assumed under the Pilot Program. The audit team identified inconsistencies with established project files maintenance procedures through file reviews conducted during the audit. The following inconsistencies were noted:

- (a) Files with incomplete and/or missing required documentation;
- (b) Files missing UFS file tabs;
- (c) Electronic correspondence and data not printed and/or located in the project file; and
- (d) Project file materials maintained separately from the project file.

Additionally, the audit team identified a lack of direction and consistency among Caltrans staff on what items should be included in

the official administrative file. A lack of consistency of filing procedures existed among generalists interviewed during the audit.

(N8) Establishment of Environmental Project Files--The audit team observed a lack of clear understanding and inconsistent implementation among Caltrans staff on when to establish environmental project files. SER Chapter 38 ``Instructions for Using the UFS'' states ``Establishing environmental project files based on this UFS as soon as environmental studies begin, and maintaining these files are mandatory.''

(N9) QA/QC Process Implementation--The Caltrans QA/QC process developed to comply with section 8.2.5 of the MOU has not been consistently implemented for all projects assumed under the Pilot Program. Caltrans requires that each environmental document be reviewed according to the processes established in the policy memo ``Environmental Document Quality Control Program under the NEPA Pilot Program'' (July 2, 2007). The audit team identified through interviews with Caltrans staff and through project files reviews that an inconsistent understanding and implementation of the steps in the QA/

[[Page 7541]]

QC process for environmental documents existed.

The audit identified a general lack of understanding of the purpose of the use of the Internal Certification with respect to its role in the Pilot Program responsibilities assumed. This lack of understanding involves the overall reasoning and logic for the comprehensive progression of authorities of the reviews needed in completion of the certification form. The audit identified a lack of clear understanding among Caltrans staff that the environmental branch chief must be the final signatory. Considering these misunderstandings and the deficient finding (D2) below, the Audit team recommends that Caltrans evaluate the use of the QC Certification Forms to assess whether the intended goals of its use are being met.

Findings--Deficient

(D1) Performance Measure--Section 10.1.3 of the MOU requires Caltrans to collect data and monitor its progress in meeting the performance measures in section 10.2 of the MOU, including performance measure 10.2.1(C) (i): ``Assess change in communication among Caltrans, Federal and State resource agencies, and the public.''. Currently, Caltrans has no metric to evaluate this performance measure.

(D2) QA/QC Certification Process--To comply with MOU section 8.2.5 and SER Chapter 38, Caltrans requires staff to review each environmental document in accordance with the policy memo titled ``Environmental Document Quality Control Program under the NEPA Pilot Program'' (July 2, 2007). The audit team observed the following deficiencies through Caltrans staff interviews and project file reviews:

(a) SER Chapter 38 section, ``Quality Control Program,' requires the environmental branch chief's ``quality control review,' to always constitute the last review. In six instances identified by the audit team, the environmental branch chief was not the final reviewer based on the dates indicated on the forms.

(b) The SER Chapter 38 requires that the Caltrans' independent review of the environmental document not begin until the External QC Certification form has been completed. It was observed in three instances that the completion of the Internal Certification QC form predated the completion of the External Certification QC form.

(D3) Submission of Environmental Documents for Legal Review--Three of the four environmental documents the audit team identified as having

undergone legal review prior to the July 2008 audit were not submitted in accordance with the procedures specified in the Division of Environmental Affairs (DEA) memorandum dated July 2, 2007, ``Environmental Document Quality Control Program under the NEPA Pilot Program'' (nor, by reference, the then-operative October 15, 2007, Caltrans Legal Division memorandum, ``Procedures for Determining Legal Sufficiency for Environmental Documents under the NEPA Pilot Program'). The procedural deviations identified are as follows:

(a) One NEPA environmental assessment, meeting Caltrans' criteria for a ``Complex EA'' per the July 2, 2007, DEA memorandum (public controversy and controversy over project purpose), underwent legal review prior to approval without the program office having provided the reviewing attorney any of the supporting documentation for ``Complex EAs'' required by the July 2, 2007, and October 15, 2007, memoranda.

(b) Two other transmittals were sent to request the initiation of the formal Legal Sufficiency review without the reviewing attorney having been provided all six items required by the July 2, 2007, and the October 15, 2007, memoranda. In those cases, however, the attorney did eventually receive all required items.

(c) It was observed that a District's transmittal of a Final EIS for Legal Sufficiency review predated the Environmental Branch Chief's certification on the Internal Certification form. The SER Chapter 38 requires that the transmittal to the Legal Division will include the completed and signed Internal and External QC certification forms.

(D4) Environmental Document Process--Class of Action Determinations--The audit team found an inconsistent understanding and implementation of the process for documentation of class of action determinations and concurrences. The NEPA process, dictates that the thought process and analysis necessary for the determination of the class of action for a project should be documented as part of the project's record keeping. Sections 771.111(a) and (b) of Title 23, Code of Federal Regulations discuss the determination and identification of the class of action for a project and to verify compliance with these regulations requires some documentation.

Additionally, Chapter 38 of the SER provides a means of documenting class of action determinations via the Preliminary Environmental Analysis Report for State Highway System projects or via the Preliminary Environmental Study form for Local Assistance projects. The procedures also require class of action determinations for all EAs (including Complex EAs) and EISs to be made with the concurrence of the Headquarters Environmental Coordinator. The SER states that, ``obtaining the concurrence of the Headquarters Environmental Coordinator may be done through an e-mail which includes the project description, proposed class of action, and rationale. The Coordinator's e-mail response will provide concurrence.''

The audit team observed through project file review in the 3 Districts visited, the process described in the SER was not consistently followed. In more than six instances, project files did not contain any record of a class of action determination or concurrence. This area was cited as Needs Improvement in the January 2008 audit. Interviews with Caltrans staff and review of project files showed varying understanding and compliance with the SER and with Caltrans Application section 773.106 (b) (3) (ii) and MOU section 5.1.1 regarding procedural and substantive requirements.

Response to Comments and Finalization of Report

Only one comment was received by FHWA during the 30-day comment period for the draft audit report. An anonymous comment was submitted that questions the cost and time saving benefits of this Pilot Program.

In considering this comment, it appears that this comment relates more to the need for the Pilot Program as opposed to the results of the audit, especially since the comment was submitted prior to the audit report being publicly available. As such, the FHWA feels that there is no need to revise the draft audit report findings to be responsive to this comment, with the exception of the addition of this section.

[FR Doc. E9-3325 Filed 2-13-09; 8:45 am]

BILLING CODE 4910-22-P